U.S. Department of Labor

Office of Administrative Law Judges
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In the Matter of

BERNARD SHARRON
Claimant

v.

UNIVERSAL MARITIME SERVICE CORPORATION
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-interest

DATE ISSUED: December 9, 1999

CASE NO.: 1998-LHC-02337

OWCP NO.: 02-122291

Appearances: Bennett Robbins, Esq.
For Claimant

Francis Womack, Esq.
For Employer

Before: ROBERT D. KAPLAN
Administrative Law Judge

DECISION AND ORDER
DENYING BENEFITS

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, *et seq.* (the "Act"), and the regulations promulgated thereunder. Hearing was held before me in New York, New York on January 27, 1999 at which time the parties were given the opportunity to submit evidence and argument.

Pursuant to my rulings at the hearing, Employer submitted, post-hearing, deposition testimony of Stanley Lysick taken on March 25, 1999 (EX 5) and Claimant submitted, post-hearing, deposition testimony of Dr. Malcolm H. Hermele taken on May 4, 1999 (CX 6).[1] There being no objection to

[1]The following abbreviations are used herein: "EX" refers to Employer's Exhibit; "CX" refers to Claimant's Exhibit; "T" refers to transcript of the hearing held on January 27, 1999.

EX 5 and CX 6, they are herewith received in evidence. Claimant and Employer filed briefs on July 29 and August 2, 1999, respectively.

JURISDICTION

Employer is in the business of stevedoring, which is the loading and unloading of ships. Claimant testified that he worked primarily as a lane and warehouse checker and briefly as a clerk checker for Employer from 1981 to 1991. (T 16) As a lane checker, Claimant testified that he handled and checked truck containers that carried cargo to and from ships. (T 17) Claimant also testified that he worked as a warehouse checker. As a warehouse checker, Claimant worked both inside the warehouse and outside on the pier. (T 19) As a warehouse checker, Claimant obtained dock receipts and checked cargo being loaded onto and being removed from ships. Claimant testified that he also worked a year or two as a clerk checker. As a clerk checker, Claimant worked inside the office and handled administrative work pertaining to vessels and trucks. Based on Claimant's testimony, I find that his employment with Employer was "maritime" in nature. Moreover, there is no controversion of the jurisdictional issue. Therefore, I find that the parties are subject to the Act.

CONTENTIONS OF THE PARTIES

Claimant contends that he is suffering from chronic obstructive pulmonary disease ("COPD") and small airways disease, based on the opinion of Dr. Malcolm Hermele. Claimant contends that he is also suffering from chronic asthma and chronic bronchitis, based on the opinions of Dr. Hermele and Dr. Marjorie Lee. Claimant further posits that the aforementioned pulmonary conditions were caused by his exposure to harmful fumes and substances while he was employed as a longshoreman from 1966 to February 1991. Claimant argues that he is permanently partially disabled due to COPD, chronic bronchitis, chronic asthma, and small airways disease. Claimant states that he did not become aware of his injuries until 1997, subsequent to his retirement.

Employer contends that Claimant's pulmonary conditions are not causally related to his employment. Rather, Employer contends that the evidence establishes that Claimant's pulmonary conditions resulted from his many years of heavy cigarette smoking. Therefore, Employer argues that the claim should be denied.

THE ISSUES

The issues to be resolved are:

1. Whether Claimant has pulmonary conditions that are causally related to his employment in the longshore industry.

2. The nature and extent of Claimant's disability, if any.

3. Claimant's average weekly wage and rate of compensation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Summary of the Evidence

Claimant was born on March 1, 1922. (T 5) Claimant testified that he had some high school education but did not receive a high school diploma. (T 6) Claimant was in the U.S. Air Corps during World War II and was honorably discharged. (T 7) Claimant began working as a longshoreman in 1966 and was employed by numerous longshore companies until his last employment with Employer from 1981 until his retirement in 1991. (T 15-16, 28)[2]

While working for Employer, Claimant worked as a lane, warehouse, and clerk checker. Claimant testified that he worked inside an office as a clerk for a year or two. Claimant alleges that while working as a lane and warehouse checker, he was exposed to harmful fumes and substances which purportedly caused his pulmonary conditions. As a lane checker, Claimant checked containers. There were approximately ten lanes of trucks. The checkers worked in booths. Claimant testified that he inhaled harmful fumes from the diesel trucks and that the fumes also gave off black smoke which would rise to the roof and condense into pellets. As a warehouse checker, Claimant checked cargo both inside the warehouse and outside on the pier. Inside the warehouse, Claimant at times had to go into trucks to locate certain cargo while a hi-lo truck was operating there. Claimant testified that he was exposed to harmful fumes from the hi-los. Claimant also testified that he came in direct contact with a wide variety of harmful substances from cargo breakage and spillage that occurred inside the warehouse, on the pier, and inside trucks. Claimant testified that he was exposed to the following substances:

> ammonia, solvents, paints, dyes, wool, carpeting, pottery, ceramics, formaldehyde, cow hide, alcohol, glues, deodorants, grains, food, chemicals, aluminum oxides, diesel fuel, gasoline, chlorine.

(T 22-26) On a form provided by Dr. Hermele, Claimant circled numerous substances as those he was exposed to while working as a longshoreman. They include but are not limited to dust, fumes, gases, dirt, acids, alkali, asbestos, carbon monoxide, fiberglass, aerosols, oil mist, chemicals used in plastic products, petroleum products, dyes, paints, sprays, inks, metallic dust, powders, wools, cottons, synthetic materials, welding fumes, solvents, pesticides, silica products, alcohol, smoke, cleaning fluids, arsenic, lead, glue, TCB, MBK, carbide, vinyl chloride, herbicides, fluoride gas, chlorine gas, coal dust, carbon black, benzene, carbon tetrachloride, paper dust, coolants, ceramic dust, fibrous glass, fibrous rocks, and sand. (CX 6) Claimant testified that he believed he was exposed to these substances even though the containers or packaging were not broken or cracked.

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[2]I have previously found that the parties are subject to the Act.

Claimant testified that he was first hospitalized in 1977 due to breathing problems. Claimant stated that from 1977 to the present, he has been treated with four types of inhalers and a nebulizer. Claimant testified that he smoked less than a pack of cigarettes a day from the 1950s to 1975 or 1976. Claimant stated that he has difficulty walking a block without having to catch his breath, has difficulty walking up steps, has spasms which constricts his breathing, cannot engage in any exertional activities, coughs up mucous, and has to sleep with two pillows. Claimant testified that he was diagnosed with fibrillation, a heart condition, approximately 3 years ago. (T 5-85)

Claimant voluntarily retired from his employment with Employer in 1991. (T 28) On August 27, 1997, Claimant filed the claim for compensation, alleging occupational pulmonary condition due to exposure to dust, fumes, asbestos, dirt, and other deleterious fumes and substances while employed with Employer. (CX 1)[3]

The following pulmonary function studies were performed at the Brooklyn Longshoremen's Medical Center in Brooklyn, New York. (CX 4) A pulmonary function study was performed on May 13, 1991. (CX 4) Dr. Hamed Qaisar found severe decrease in forced vital capacity, severe decrease in FEV_1, moderate decrease in FEV_1, and severe decrease in peak and forced expiratory flow rates. Dr. Qaisar concluded that Claimant has a moderate obstructive and severe restrictive lung disease. Another pulmonary function study was performed on October 21, 1993. (CX 4) Dr. Qaisar found minimum decrease in forced vital capacity, moderate decrease in FEV_1 and FEV_1 percentile, moderate decrease in peak flow, and severe decrease in forced expiratory flow rates. Dr. Qaisar noted that there was significant improvement with a bronchodilator. Dr. Qaisar concluded that Claimant has a moderate obstructive lung disease. A third pulmonary function study was performed on April 6, 1995. (CX 4) At that time, Dr. Qaisar found minimum obstructive lung disease with no change after administration of a bronchodilator medication. A pulmonary function study was performed on April 16, 1996. (CX 4) Dr. Santosh Sureka found that the FEV_1/FVC ratio of 61 percent in that study was suggestive of mild obstructive lung disease. Dr. Sureka also stated that restrictive lung disease may be present.

The following chest X-rays were taken at the Brooklyn Longshoremen's Medical Center. (CX 4) On October 9, 1993, a chest X-ray was taken and Drs. Mark Borenstein and Joshua Antiles noted that the cardiac silhouette and pulmonary vascular markings were within normal limits, lungs were free of infiltrates, and the costophrenic angles were clear bilaterally. (CX 4) Drs. Borenstein and Antiles found no acute pulmonary disease. Another chest X-ray was taken on June 16, 1995. (CX 4) This X-ray was compared with the earlier 1993 X-ray by Dr. K. Math who found no evidence of active pulmonary disease and no significant change from the prior X-ray. Another Chest X-ray was taken on September 22, 1997 and compared with the prior study of October 16, 1996 by Dr. Deborah Reede. (CX 4) Dr. Reede noted that the lungs were clear and that there was no evidence of active pulmonary disease.

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[3]Employer does not contend that the claim was untimely.

On September 11, 1997, Dr. Hermele (Board certified in rheumatology and Board eligible in internal medicine) examined Claimant and issued a report. (CX 2) Dr. Hermele noted Claimant's subjective complaints were coughing up greenish yellow phlegm all day, productive cough for over two years, chest pain when taking a deep breath or coughing, wheezing, the need to use two pillows to sleep, and shortness of breath in performing any activity. The physician noted that Claimant had previously smoked cigarettes but quit in 1977. Dr. Hermele also noted poor chest wall movement on maximum inspiratory effort, prolonged expiratory phase, and decreased breath sounds at both lung bases. Dr. Hermele stated that the chest X-ray revealed increased brochovascular markings in the lower lung fields, normal contour of the cardiac and diaphragmatic silhouettes, clear apices, prominent aortic knob, and hyperlucent lung fields. Based on Claimant's history and physical examination, Dr. Hermele diagnosed Claimant with chronic bronchitis, COPD, and small airways disease. The physician stated that he estimated a permanent pulmonary disability of 45 percent. Finally, Dr. Hermele opined that Claimant's pulmonary condition is causally related to and was exacerbated by exposure to noxious agents while employed as a longshoreman.

Dr. Hermele was deposed on May 4, 1999. (CX 6) Dr. Hermele conceded that smoking could cause chronic bronchitis and that cessation of smoking can reverse some of the damage depending on the individual, how long he smoked, what he smoked, and the individual's biological potential. Dr. Hermele testified that although he was not provided with Claimant's medical records, Claimant gave him his medical history and his subjective complaints. Dr. Hermele stated that he performed five pulmonary function studies on Claimant and reported the study that produced the best results. Dr. Hermele stated that the best pulmonary function study revealed the FEC at 61 percent of predicted and the FEV_1 at 65 percent of predicted. Based on the pulmonary function study which revealed below-normal values, chest X-ray which revealed increased bronchovascular markings in the lower lung fields extending out to the periphery, his examination of Claimant, Claimant's subjective complaints, as well as Claimant's description of substances to which he was exposed, Dr. Hermele opined that Claimant's chest conditions are causally related to his occupational exposures, and to some degree to his cigarette abuse. Dr. Hermele stated that he could not quantify the degree of tobacco exposure. During cross-examination, Dr. Hermele stated that he gave Claimant a list of substances and asked him to circle all the ones he was exposed to. Dr. Hermele further testified that Claimant circled all of the substances on the list and also wrote "et cetera." However, when Dr. Hermele questioned Claimant as to what other substances he was exposed to that were not listed, Claimant could not think of more. When asked how long it usually takes between constant exposure to any one of the substances Claimant was allegedly exposed to and onset of a noticeable decrease in pulmonary function, Dr. Hermele responded that it depends on the duration and intensity of the toxicities.

Dr. Monroe Karetzky (Board certified in internal medicine, pulmonary disease, critical care medicine, and geriatrics medicine) examined Claimant on October 15, 1998 and issued a report dated October 16, 1998. (EX 1)[4] Dr. Karetzky performed a pulmonary function study on October 15, 1998

[4]At the hearing on January 27, 1999, reference was made to a supplemental report by Dr. Karetzky dated November 6, 1999 which is not part of the record.

which revealed the following: decreased expiratory flow rates; normal FEV_1; decreased vital capacity; normal total lung capacity; normal diffusing capacity; and normal arterial PO2. Dr. Karetzky noted that Claimant reported a 35-year smoking history of 1 to 1 ½ packs of cigarettes per day, ending approximately 20 years earlier. The physician also noted that Claimant has a 5-year history of asthma and a cardiac history of chronic atrial fibrillation as well as hypertension. Dr. Karetzky noted that Claimant's breath sounds are of normal quality and intensity, with no audible wheezes, rhonchi, or rales. The physician stated that there is a lack of objective findings of respiratory impairment on physical examination or chest X-ray. However, Dr. Karetzky noted a slight obstructive ventilatory defect which was observed on pulmonary function testing. Dr. Karetzky concluded that Claimant has bronchitis, unrelated to his work, but due to his long history of heavy smoking, and that the slight pulmonary impairment resulting from the bronchitis is not severe enough to result in a pulmonary disability.

At the hearing on January 27, 1999, Dr. Karetzky reiterated his diagnosis of mild obstructive ventilatory defect attributable to Claimant's previous heavy smoking history. (T 108) Dr. Karetzky based his diagnosis on Claimant's history and physical examination, chest X-ray, complete pulmonary function test, including spirometry, static lung volumes, and arterial blood gas studies, as well as the diffusing capacity. (T 88) The physician stated that the FVC is somewhat decreased and this can be a result of loss of lung tissue from pulmonary fibrosis or it can be from lack of effort during the testing. (T 93-94) Dr. Karetzky further stated that the defect is mild and it is not of a severity that is disabling. (T 95) However, Dr. Karetzky stated that the total lung capacity (TLC), the size of Claimant's lung determined independent of his effort, was in the normal range because the lungs were 91 of predicted and generally anything at 80 or above is considered to be in the normal range. (T 96-97) The physician also found that the arterial blood gas study produced normal values. Therefore, Dr. Karetzky opined that Claimant does not have a restrictive lung defect. However, the physician opined that Claimant has a mild obstructive ventilatory defect attributable to his previous smoking history and that it is not severe enough to result in a disability. As for Claimant's alleged exposures to many harmful substances and fumes, Dr. Karetzky stated that Claimant's exposure to chlorine would be the most significant but that chlorine exposure is indefinite and generally results in a restrictive ventilatory defect rather than the obstructive ventilatory defect that Claimant has. Therefore, Dr. Karetzky stated that he does not feel that the description of exposures by Claimant contributed to his obstructive ventilatory defect. When asked on cross-examination whether he gave any credence to the allegation that Claimant stopped smoking 22 or 23 years ago and that he smoked less than a pack of cigarettes a day, Dr. Karetzky responded that Claimant reported that he had smoked 1 to 1 ½ packs of cigarettes a day for approximately 35 years. In addition, Dr. Karetzky noted that the Brooklyn Longshoremen's Medical Center (where Claimant was treated) records state that Claimant smoked two packs of cigarettes a day for 30 years (a 60 pack-year smoking history). (EX 3)

In her report dated January 18, 1999, Dr. Marjorie Lee (Board certified in internal medicine and pulmonary disease)[5] reported that Claimant had a 24 pack-year smoking history, ending in 1975. (CX 5) Dr. Lee stated that the October 15, 1998 pulmonary function study revealed chronic airways disease with no apparent responsiveness to bronchodilators. The physician also stated that these studies are consistent with chronic asthma or chronic bronchitis and that there was no evidence of emphysema related to Claimant's prior smoking. Dr. Lee opined that Claimant's dyspnea is predominantly due to his chronic obstructive airways disease although cardiac decompensation may also be a contributing factor. Finally, Dr. Lee stated the following conclusion:

> Based upon [Claimant's] previous history of physical well being prior to working as a checker, his inability to participate in sports after about 5 years of his dock work at approximately age 48, allergies which prompted him to seek private allergy desensitization in 1979, and exposure to workplace irritants, chemicals, powders, dusts, asbestos, and fumes, Claimant's chronic pulmonary condition most likely is occupationally related rather than related to his prior smoking.

Stanley Lysick (Employer's manager of safety and health) was deposed on March 25, 1999. (EX 5) Mr. Lysick testified that many different types of cargo are handled by checkers and that there sometimes is spillage. Mr. Lysick stated that longshoremen are instructed to get away from a spillage of hazardous material and notify someone with authority. Mr. Lysick further stated that when a spill occurred, typically one of the supervisors would come and determine the extent of the hazard and then would call a company to come in and clean it up. In case of a non-hazardous spill, Employer's sweepers are called to clean up the spillage. Mr. Lysick testified that there are gasoline, propane, and electric hi-los. Mr. Lysick conceded that the gasoline fumes can be "overwhelming" for a checker who is in a container with a gasoline hi-lo. Mr. Lysick also conceded that he had seen spillages himself and agreed that when certain objects break, particles can become airborne. Finally, Mr. Lysick conceded that other than asbestos, all substances that Claimant is alleging contact with could have been a cargo handled by Employer.

Discussion

The initial question is whether Claimant's pulmonary conditions were caused by his employment (i.e., by exposure to harmful fumes) in the longshore industry which concluded with his employment by Employer from 1981 through 1991.

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[5]Dr. Lee's qualifications were obtained from the American Board of Medical Specialities (ABMS) website at www.abms.org.

Section 20(a) of the Act aids claimants in establishing a causal relationship between injury and employment, stating that "in the absence of substantial evidence to the contrary," it is presumed "[t]hat the claim comes within the provisions of the Act." The Supreme Court in Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994), recognized the continuing viability of the § 20(a) presumption.

Claimant has the burden of establishing the § 20(a) presumption (i.e. the prima facie case). To invoke the presumption, a claimant must show that (1) the worker sustained physical harm, i.e., an injury, and (2) a work-related accident occurred, or working conditions existed, which could have caused the harm. Once these two elements have been established a claimant has established a prima facie case and is entitled to the presumption that the injury arose out of employment. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981). Once the § 20(a) presumption has been invoked by the evidence, the employer has the burden of establishing the lack of causal nexus. Dower v. General Dynamics Corp., 14 BRBS 324 (1981). The employer must present evidence that is sufficiently specific and comprehensive to sever the potential connection between the particular injury or disease and the job. Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), cert. denied, 429 U.S. 820 (1976). Once the § 20(a) presumption is rebutted, it falls out of the case and all the evidence must be weighed to resolve the causation issue. Hislop v. Marine Terminals Corp., 14 BRBS 927 (1982); Swinton, 554 F.2d 1075, 4 BRBS 466.

Drs. Hermele, Lee, and Karetzky all agree that Claimant has COPD or chronic bronchitis. Consequently, I find that the first element under § 20(a), that Claimant sustained an "injury," has been established.

Claimant testified that he was exposed to fumes and other substances during his 25 years of longshore employment. In addition, Drs. Hermele and Lee opined that Claimant's pulmonary conditions are causally related to his exposure to noxious agents while employed as a longshoreman. Based on the foregoing, and without considering any contrary evidence, I find that Claimant has established the second element under § 20(a), that conditions existed at Employer's facility that could have caused his pulmonary conditions. Therefore, Claimant has established a prima facie case and the § 20(a) presumption has been invoked.

Once the § 20(a) presumption has been invoked, the burden is on the employer to go forward with substantial countervailing evidence to rebut the presumption that the injury was caused by the claimant's employment. Swinton, 554 F.2d 1075, 4 BRBS 466. Thus, the relevant inquiry is whether the employer succeeded in establishing a lack of causal nexus. Dower, 14 BRBS 324. To rebut the presumption, Employer relies primarily on the opinion of Dr. Karetzky that Claimant's pulmonary condition was caused by his cigarette-smoking history. Dr. Karetzky diagnosed Claimant with COPD and chronic bronchitis caused by his long history of smoking. Dr. Karetzky relied on the following in reaching his diagnoses: claimant's medical history; physical examination; chest X-ray; pulmonary function testing; static lung volumes; and arterial blood gas studies. I find Dr. Karetzky's opinion, that Claimant's pulmonary conditions are caused by his long history of smoking, constitutes substantial countervailing evidence that severs the presumed relationship between Claimant's

pulmonary conditions and his longshore employment. (Dr. Karetzky's opinion will be discussed more fully below.)

Once the § 20(a) presumption is rebutted, it falls out of the case and the judge must then weigh all the evidence and resolve the case based on the record as a whole. Hislop, 14 BRBS 927; Swinton, 554 F.2d 1075, 4 BRBS 466. Consequently, I shall next turn to weighing all the relevant evidence to determine whether Claimant has carried his burden of establishing that his pulmonary conditions were caused by his longshore employment.

The opinions of Drs. Hermele, Lee, and Karetzky are in conflict regarding the cause of Claimant's pulmonary conditions. Drs. Hermele and Lee both attributed Claimant's pulmonary conditions to his 25 years of employment in the longshore industry. On the other hand, Dr. Karetzky opined that Claimant's pulmonary conditions are caused by his history of smoking 1 to 1 ½ packs of cigarettes a day for 35 years.[6]

Dr. Karetzky disagreed with Dr. Hermele that all of the substances listed by Claimant could have caused his chronic obstructive disease. Dr. Karetzky stated that within the medical community, there is uniform agreement with respect to smoking as a causative factor. Other than smoking, Dr. Karetzky stated, there are very few substances which are uniformly agreed to cause chronic obstructive disease.[7] Furthermore, Dr. Karetzky stated that concentration, duration, and cumulative doses of exposure are factors that are very important in determining whether these substances in any part caused Claimant's pulmonary conditions. Dr. Karetzky stated that he does not believe that the exposures described by Claimant could have contributed to his obstructive ventilatory defect. On the other hand, Dr. Hermele testified at his deposition on May 4, 1999 that many of the chemicals and compounds Claimant stated he was exposed to are causative agents of chronic bronchitis, COPD, and small airways disease. Dr. Hermele based his opinion in part on Table 2 on page 69 of the medical text, Occupational Asthma by Burdana, Montanaro & O'Hollaran, 1992. (CX 6) However, Occupational Asthma in pertinent part states: "Table 2 lists many of the proposed causative agents in occupational chronic bronchitis." (Emphasis added.) In addition, Dr. Hermele conceded that

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[6]The record contains conflicting evidence regarding Claimant's cigarette-smoking history. At the hearing on January 27, 1999, Claimant testified that he smoked less than a pack of cigarettes a day from 1950 to 1975 or 1976. Dr. Lee stated in her report that Claimant had a 24 pack-year smoking history, ending in 1975. Dr. Hermele noted that Claimant previously smoked cigarettes but had quit in 1977. Dr. Karetzky was given a 35 year smoking history of 1 to 1 ½ packs of cigarettes per day, ending approximately 20 years earlier. Finally, the Brooklyn Longshoremen's Medical Center records show that Claimant smoked 2 packs of cigarettes a day for 30 years.

[7]Dr. Hermele criticized Dr. Karetzky's statement that smoking is the sole cause of chronic bronchitis, stating that some of these substances are "medically accepted" as causative agents of chronic bronchitis. However, Dr. Karetzky did not state that smoking was the only irritant that can cause chronic bronchitis, but rather that smoking is the outstanding example of such irritants.

generally the dosage and duration of exposure to each of the substances are relevant factors in determining whether they could cause a pulmonary condition.

As noted, Claimant testified to many substances that he was allegedly exposed to during his longshore employment. However, Claimant was unable to specifically state how he was exposed to these substances, how they were packaged, or even what form they were in during his exposure. Claimant testified that his recall of substances to which he was exposed was through what he remembered from dock receipts rather than through recollection of a particular spillage or breakage. When questioned about his exposure to particular substances, Claimant's responses were vague and he was unable to pinpoint how many times he had been exposed to particular substances. Claimant also stated that he assumed that he was exposed to certain chemicals based merely on the fact that they were listed on dock receipts. This court specifically questioned Claimant regarding his exposures and how he knew he was exposed to certain substances:

> Q: And you saw with your eyes that something was leaking out of a container, and you saw the invoice or bill of lading, and it said chlorine. Is that what you're telling us? Was there something you saw leaking? Out of a container?
>
> A: No. I'm just saying that I've handled it. I've...
>
> Q: So, even if it was not leaking, you felt you were exposed to it?
>
> A: Yes, I handled it.
>
> Q: ...through the – through the container? Even though the container was not breached or broken or cracked?
>
> A: Well, it may not be a container, sir. It could be in the trailer, in the packaging, in the cargo.
>
> Q: So, you're saying even if the packaging was not broken or cracked or breached in any way, you felt you were exposed to this material?
>
> A: That I really couldn't answer, whether I could sense the odor or whatever.
>
> Q: Well, how do you know you were exposed to it then if you didn't see anything?
>
> A: Well, I could only refer to the commodity, what the dock receipt refers to.

(T 76-77) Claimant was also questioned about how often he actually saw a leakage. Claimant could not recollect how often he actually saw a leakage in his ten years of employment with Employer. (T 81) I find that Claimant greatly exaggerated his exposure to harmful substances. This exaggeration is exemplified by his checking of every substance named in Dr. Hermele's list and then adding "et

cetera" to it. I find Claimant's testimony regarding his alleged exposures to be vague and unconvincing.

I find that Dr. Lee's opinion is entitled to little if any weight. Dr. Lee opined that Claimant's pulmonary conditions are caused by his occupational exposures rather than his smoking history. Dr. Lee's opinion is defective because she relied on a 24 pack-year smoking history versus the 30 to 45 pack-years reported by Claimant himself to Dr. Karetzky and the 60 pack-years referred to in the medical clinic records. Further, the physician based her opinion solely on the fact that Claimant began having breathing problems five years after he started working in the longshore industry where he was allegedly exposed to these substances and that Claimant had to seek allergy desensitization in 1979. However, the fact that Claimant began having breathing difficulties and allergies after he began working in the longshore industry, in and of itself, is not significant evidence that his employment caused his pulmonary conditions. Making this assumption is an example of the classical logical defect of *post hoc ergo propter hoc*, i.e., that simply because one event follows another, this does not establish that the second event was caused by the first. In this regard, I particularly note it is also true that Claimant's breathing problems began after he had been smoking for approximately twenty years. Dr. Lee also failed to explain how she ruled out Claimant's prior smoking history in determining the cause of his pulmonary conditions.

Dr. Hermele's opinion is also problematic because Claimant admitted at the hearing that he was not familiar with many of the substances on the physician's list but nevertheless circled them as substances he was exposed to during his employment in the longshore industry. Dr. Hermele's opinion is also defective because he, concededly, only had knowledge of when Claimant stopped smoking, not the extent or duration of his smoking history.

On the other hand, Dr. Karetzky's opinion is well-reasoned. Dr. Karetzky took into consideration all factors including Claimant's prior smoking history as well as Claimant's alleged exposures. (Also see the description of the diagnostic studies and other evidence Dr. Karetzky took into consideration, at page 9, above.) Therefore, I find Dr. Karetzky's opinion is entitled to the most weight regarding whether Claimant's alleged exposures to substances while employed in the longshore industry caused his pulmonary conditions. Further, although both Dr. Karetzky and Dr. Hermele stated the importance of determining the duration, concentration, and dosage of the exposure Claimant had with each substance, there is no indication from the reports of either Dr. Hermele or Dr. Lee that they had any knowledge regarding the nature and extent of the exposures. Moreover, Dr. Karetzky's qualifications are superior to those of Dr. Hermele.

Weighing all the evidence, and based on the foregoing analysis, I find that Claimant has failed to carry his burden that exposure to substances and fumes in his longshore employment was a causative factor of his pulmonary conditions. Consequently, Claimant is not entitled to benefits under the Act, and the claim must be denied.

ATTORNEY'S FEE

As there has not been a successful prosecution of this case, Claimant's counsel is not entitled to an attorney's fee.

ORDER

It is ORDERED that the claim for compensation for disability of Bernard Sharron is denied.

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Robert D. Kaplan
Administrative Law Judge

Dated: December 9, 1999
Camden, New Jersey